IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 308 of 1995

to

CRIMINAL REVISION APPLICATIONNo 2863 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judg.

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JOHN HAMILTION CHRITIAN

Versus

TAPTI CORPORATION

Appearance:

MR PRASHANT G DESAI for petitioner in all applications.

Respondents Nos. 1 to 7 in all are served.

MR DD VYAS for Respondent No.2 and 4 in application no.308/1995.

Sr.Advocate Mr.M.R.Anand, G.P. for Respondent No. 8 in all applications.

CORAM : MR.JUSTICE S.M.SONI

Date of decision: 7th May,1997

(C.A.V.) JUDGEMENT

As common questions of law and facts arise and the parties in all these applications are also the same, they are disposed of by this common judgment with the consent of the parties Advocates.

All these Revision Applications are directed against the judgment and order dated 8th June, 1995 passed by the learned Judicial Magistrate, First Class (Municipality), Surat in respect of Municipal Case nos. 24/87 to 1563/87, 1574/87 to 2576/87 whereby the learned Magistrate has dismissed the complaints holding them as barred by period of limitation contemplated under Section 428 of the Bombay Provincial Municipal Corporation Act,1949(" B.P.M.C. Act" for short) and Section 468 of the Code of Criminal Procedure,1973("Code" for short).

The respondents nos. 1 to 7(original accused nos.1 to 8) were carrying on business in partnership in the name and style of the accused no.1 as distributor of Narmada Cement Company. (Original accused no.2 has died). The accused no.1 is a firm of which accused nos.3 to 7 are the partners and accused no.8 is its Manager. Accused nos.2 to 7 are family members. The accused no.1 used to purchase cement from Narmada Cement Co.Ltd. and were selling to its different customers the said cement so brought from its cement factory at Magdalla, District Surat, through motor transport. Whatever goods were brought to Surat entered Surat City through different octroi check posts and were delivered to different customers. Instead of paying octroi duty immediately the accused no.1 firm has obtained a facility to open an account and pay the same after settling the accounts. Under the said facility, they were required to submit a declaration form and get the same entered with the concerned octroi check post and obtain a credit pass therefor. At the end of the month the account was required to be settled in respect of goods that entered the town and pay octroi duty on the same. The accused no.1 obtained necessary credit pass on submitting the declaration form duly filled in. However, with a view to avoid payment of octroi duty full price of the goods were not declared in the monthly statement at the time of monthly settlement of accounts. They have not paid the octroi thereon and have made Surat Municipal Corporation to suffer economically. Thereafter, requisition was issued under Rule 21 of the Octroi Rules and standing orders of Surat Municipal Corporation. However, the same is also not returned duly filled in and thereby the accused have committed an offence for the breach of Rules 21 and 22 punishable under Section 28(1), 28(2)(a) and

28(2)(c) of the Octroi Rules. The accused also committed an offence under Section 398 of the B.P.M.C. Act by intentionally not paying octroi duty. The accused are liable to pay ten times the amount of Octroi duty not paid as penalty The complainant came to know about the commission of offence on respective dates mentioned in the complaint.

On summons being served accused gave an application Exh.8 in each complaint contending that the complaint filed is filed beyond period of limitation of six months and are barred under Section 468 of the Code of Criminal Procedure (" Code" for short) and Section 428 of the B.P.M.C. Act. The complaint is therefore liable to be dismissed and it is not necessary to record the plea in each complaint. It is therefore prayed to set free the accused. The said application Exh.8 was given on 1st August, 1987. The said application came up for hearing before the Judicial Magistrate, First Class(Municipality) who by its judgment and order dated 19th August, 1987 allowed the same and held that all the cases suffer from the vice of bar of limitation as the same are not filed within the period of limitation contemplated under Section 468 and 469 of the Code and are dismissed. Against the said judgment and order, complainant preferred different Revision Applications before this Court being Criminal Revision Applications nos.2157/87 and others. The said Revision Applications came to be disposed of on 2nd December, 1989 by Justice S.B. Majmudar(as he then was) after hearing the learned Advocates for the parties. The learned Judge held that the dismissal of the complaint for the breach of Rules 4 and 22(2) is not erroneous as they are clearly barred by limitation. However, so far as the breach of Rule 21 is concerned, necessary requisitions under Rule 21 were issued to the accused. The requisition forms were not replied within time and enquiry was made and the complaint is filed. It is also observed in the judgment" but the fact remains that in all these complaints breach of Rule 21 is alleged and therefore, it was necessary to decide the question whether the complaint was within time for the breach of Rule 21 in each of the cases and unfortunately the same was not examined by the learned Magistrate.The High Court therefore remanded the matter back to the learned Magistrate to examine the question about alleged breach of Rule 21 read with Rule 28 and Section 398 of the B.P.M.C. Act on limitation and if necessary on merits. If such inquiry on merits survives in the light of the decision of limitation, the Court has also given a direction that necessary evidence will be permitted to be led by both the sides and then the

learned Magistrate will decide. That is how the matter came up before the learned Judicial Magistrate, First Class, Surat and after hearing the parties he has dismissed the complaint as barred by limitation except three complaints being Municipal Cases nos.676/87, 677/87 and 678/87. These Revision Applications are directed against the said order. These Revision Applications came up for admission hearing on 28th November, 1995 when Rule was issued making it returnable on 13th December, 1995. Thereafter, it appears that on 2nd February, 1996 a common order was passed whereby leave to amend was granted and a fresh notice was ordered to issue to respondents nos.1 to 7 which was made returnable on 4th March, 1996. Notice of Rule in each case was sent by registered post A.D. to each of the respondents nos.1 to 7. Learned Advocate Mr. D.D.Vyas has filed his appearance for the respondent no.4 in Civil Revision Application no.308 of 1995 and has made a statement that he also appears for respondent no.2 and he will be filing his appearance. Notice issued on respondents nos. 1, 3, 5, 6 and 7 were received back by the office with an endorsement " refused" by the postal authorities. There is a presumption that properly and correctly addressed prepaid registered post if delivered to the addressee and if the addressee refuses to accept the same, then it can be said that he knows the contents thereof and the notice is presumed to be served upon him. This is how the respondents nos. 1, 3, 5, 6 and 7 are served. The respondent no.8-State is joined a necessary party in all Revision Applications and is represented by learned Senior Advocate Mr. M.R.Anand. Learned Advocate Mr. D.D.Vyas has filed an affidavit of respondent no.4 in all the revision applications to show that the endorsement of refusal on the postal envelopes received back by the Court is not a correct endorsement by the postal authority in as much as the respondents nos. 3, and 5 are abroad. It will be relevant to state that respondents nos.2 and 4 for whom he appears are served at the address which is also the address shown to be of respondents nos. 1,3,5,6 and 7. Though the respondents nos.2 and 4 are served at the address which is shown to be the address of respondent no.1, the respondents nos.2 or 4 has not accepted the notice of respondent no.1 which is a firm of which the respondents nos.2 to 7 are the partners. It is the duty of the respondents nos.2 and 4 to help the administration of justice and it can be presumed that they must have communicated the contents of the notice received by them to the respondents nos. 3 and 5. Therefore, in absence of anything on record to show dissolution of firm affidavit filed by the respondent no.4 is required to be ignored. In any case

all the respondents and , in particular, respondents nos.2, 4, 6 and 7 are served in all the applications. Filing of such an affidavit by the respondent no.4 in all the revision applications, in my opinion, suggests that respondents avoid the appearance, on technical grounds though they have knowledge of these revision applications being filed. Respondents nos. 3,5, 6 and 7 do not rebut the presumption of service of that registered post which contained notice of Rule of these Revision Applications by affidavit of respondent no.4.

Learned Advocate Mr. Vyas has also raised an objection that service of one notice incorporating all the numbers of Revision Applications does not amount to service of notice in all the Revision Applications. Mr. Vyas contended that notice of each Revision Application is required to be served separately and stating number of all the Revision Applications in one notice does not amount to service of notice in all the Revision Applications except one and option is with addressee to decide in which matter he accepts service. Despite this contention, respondent no.4 has filed one affidavit referring numbers of all the revision applications. I, therefore, do not find any irregularity in serving collective notice, particularly, when facts are the same, parties are the same and offence also is the same however, covering different period. Rule, breach of which constitutes the offence is also the same. Mr. Vyas though raised this contention, is not able to substantiate the same either by showing any precedent or demonstrating how accused will be prejudiced by serving collective notice in such a manner and form. Purpose of service of notice is to communicate the date, place and time of hearing of the cases stated therein. If the party had any confusion in the mind about the numbers he may have checked up for the same from the record. The collective notice does not defeat the principal of natural justice and in particular audi alterum partem. Thus, I do not find any substance in this objection raised by Mr. D.D.Vyas

Mr. Vyas raised a third preliminary objection and that is that the service of notice of Rule by registered post A.D. is not warranted by Code or any rules and is therefore not a proper service. Chapter VI of the Code provides for provision as to processes to compel appearance. Section 61 of the Code provides for form of summons. Purpose of issuance of summons is to communicate and inform the person of the complaint against him and direction to remain present on the date and time before the Court named therein. It can be said

that it is communication by the Court of the substance of the complaint with the date, time and place to remain present if he has to say anything in defence. Section 62 provides for the manner as to how the summons shall be served. It is true that in none of the provisions of Section 61 to 68 a provision is made to serve the summons through postal authority. There is nothing in the Code which prohibits service of summons/ notice through postal authority. An attempt was made to serve the process as contemplated in chapter VI through Court. On failure to serve, accordingly, notice of Rule is served by registered post. Issuance of notice of Rule by registered post is by an order of the Court empowered to pass such order under Section 482 of the Code. The Court cannot remain a mute spectator to avoidance of the process of the Court and tire out the applicant and the Court and frustrate the proceedings. Purpose of service of summons or Rule is to inform the party of case against him and that the hearing thereof is fixed on a particular day, date, time and place and to comply with the principles of natural justice , namely, audi alterum partem. Non appearance under the guise that there is no provision in the Code to serve notice of Rule by registered post is at their own peril. Such defence of non service in my opinion, amounts to defeating the ends of justice I, therefore, hold that service of notice by registered post is legal and proper.

Learned Advocate Mr. Vyas has raised a contention that the order passed by the learned Magistrate dismissing the complaint is an order of acquittal. An appeal under Section 378 is required to be filed and the Revision Application filed is not maintainable. To answer this contention it is necessary to decide whether the order passed by the learned Magistrate is an order of acquittal or is an order of discharge of the accused or it simpliciter is an order to drop the proceedings. The complaint being barred by limitation under Section 468 of the Code and Section 428 of the B.P.M.C. Act, Court cannot take cognizance.

Learned Advocate Mr. Vyas contended that the offence made out in the complaint is a summons case. Summons case means a case relating to an offence and not being a warrant case vide clause (w) of Section 2 of the Code). Warrant case means a case relating to an offence punishable for death, imprisonment for life or imprisonment for term exceeding two years(Clause (x) of Section 2 of the Code). There is no dispute about the fact that complaint is for a summons case. Procedure for trial of summons case is provided in Chapter XX of the

Code. On service of the summons when the accused appears before the Court under Section 251 of the Code, substance of the accusation has to be stated and is required to be asked whether he pleads guilty or has any defence to make but it shall not be necessary to frame a formal charge. Thus, in summons cases it is not necessary to frame a formal charge but when the accused appears before the Court he is required to be informed of the particulars of the offence and be asked whether he pleads guilty. Section 252 of the Code contemplates that the plea be recorded by the Magistrate and as nearly as possible in the words of the accused and may, in his discretion convict him thereon. It is again a discretion with the learned Magistrate to convict him or not on his plea. If he is not convicted, Section 254 of the Code comes into play and then comes the stage of acquittal or conviction. In the instant case admittedly on summons being served before his plea is recorded accused have filed application Exh.8 in all the cases. Therefore, before any proceedings are taken under Chapter XX of the Code, the Magistrate has considered that application Exh.8 and has held that the complaint is barred by limitation and once the complaint is barred by limitation, learned Magistrate cannot take cognizance of the offence. The question of acquittal or conviction will only arise if the learned Magistrate takes cognizance of the case. In cases where the complaints are barred by limitation under Section 468 of the Code , the Magistrate or a Court shall not take cognizance of the offence. Therefore, when the learned Magistrate has not taken cognizance of an offence, the question of acquitting or convicting the accused does not arise. Therefore, in my opinion, the dismissal of the complaint does not amount to acquittal of the accused.

Section 378 of the Code provides for filing of an appeal from an original or appellate order of acquittal passed by the Court other than High Court or an order of acquittal passed by the Court of Sessions in Revision. Section 255 of the Code contemplates an order of acquittal after recording evidence. In the instant case on a preliminary contention the complaint is dismissed which would amount to dropping of the proceedings amounting to discharge of the accused or in any case does not amount to an acquittal of the accused, and therefore appeal would not be maintainable. Sub-section (1) of Section 468 of the Code provides that no Court shall take cognizance of an offence.....after the expiry of the period of limitation. In my opinion, it is analogous to a provision that no court shall take cognizance of an offence for which it has no jurisdiction or that no court

shall take cognizance of such offence except with the previous sanction. It has been made clear that in cases where the plea of sanction is raised the accused are discharged on acceptance of the plea of invalid sanction or want of sanction. When an accused is discharged he can be prosecuted again on the defect being cured. If defect is of sanction, obtaining necessary fresh valid sanction, the accused can be prosecuted afresh before the competent court of jurisdiction. If he is discharged by the court which has no jurisdiction to try the offence either territorial or statutory he may be tried afresh by the Court of competent jurisdiction. It will be pertinent to note that when an accused is discharged or complaint against him is dismissed he is relieved of the prosecution but he is not relieved of the charges levelled against him. Law of limitation prevents the court from taking cognizance against him but does not stand relieved of the allegations against him. Thus, it is clear that the order even passed on merits by the Court which has no jurisdiction to try it is a nullity and is not an order in the eye of law and it would not amount to acquittal as he can be subsequently tried before the Court of competent jurisdiction. Thus, these Revision Applications are maintainable.

The Supreme Court in the case of MOAMMAD SAFI V. THE STATE OF WEST BENGAL (AIR 1966 SC 69) has considered the effect of order of acquittal by Court which had no jurisdiction to try while appreciating Section 403(1) of the Code. Section 403 is based on the principle of autrefois acquit and autrefois convict and the Supreme Court has held that once the accused is acquitted even after the conclusion of trial, be it not on merits but on erroneous conclusion of lack of jurisdiction to take cognizance, the order is a nullity and does not amount to an acquittal. The relevant observation is at paragraph 6 which reads as under:

" Where a Court comes to such a conclusion, albeit erroneously, it is difficult to appreciate how that Court can absolve the person arraigned before it completely of the offence alleged against him. Where a person has done something which is made punishable by law he is liable to face a trial and this liability cannot come to an end merely because the Court before which he was placed for trial forms an opinion that it has no jurisdiction to try him or that it has no jurisdiction to take cognizance of the offence alleged against him. Where, therefore, a Court says, though erroneously, that it was not competent to take cognizance of the offence it has no power to acquit that person of the offence."

This Court in the case of STATE OF GUJARAT V. JAMADAR MANSINGRAO BHAGAVATRAO (1969) X G.L.R 537 has held as under (relevant observation at page 552):

" As in the instant case, the prosecution was already entertained by the Court of the Special Judge and it having been instituted more than six months after the date of the act complained of, the prosecution has got to be dismissed, if that section has application. That order cannot be, by any stretch of imagination, said to be an order of acquittal, as contemplated under the provisions of the Code. I, therefore, hold that this impugned order, being not an order of acquittal, it was not appealable under the provisions of sec.417 of the Code. It being not an appealable order, the provisions of sub-sec.(5) of sec.439 of the Code cannot be pressed into service. All the submissions made by the learned Advocate, Mr. Shelat in support of his argument that this Court has no jurisdiction to revise the impugned order in exercise of its power under secs.435 and 439 of the Code of Criminal Procedure, are not, in my opinion, well-founded submissions. "

Mr. P.G. Desai, learned Advocate appearing for the petitioner contended in the alternative that if this Court comes to the conclusion that the Revision Applications against the impugned orders are not maintainable then he may be permitted to convert these Revision Applications into appeals in view of sub-sec.(5) of Section 401 of the Code. Sub-sec.(5) of Section 401 reads as under:

"(5). Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

However, in view of my finding that Revision Applications are maintainable, this alternative contention does not survive.

This brings me to the merits of the Revision Applications. Learned Advocate Mr. P.G. Desai has filed one statement from page nos.1 to 80.

Apart from this statement furnished by Mr. Desai, in the judgment dated 2nd December 1989 of Mr. Justice S.B. Majmudar(as he then was) there is a statement that the fact remains that in all these complaints breach of Rule 21 is alleged. To this statement the accused have not taken any exception. Therefore in view of the statement furnished by the learned Advocate Mr. P.G. Desai and also the observation in the judgment dated 2nd December, it can be said that in each complaint breach of Rule 21 is alleged. The question now before the Court is , in view of rule 21, whether requisition in form no.7 has been issued in all the cases or only in three cases as accepted by the learned Magistrate. Those cases are Municipal Cases nos.676/86, 677/86 and 678/86. Mr. Desai contended that requisitions with respect to all the complaints filed before the Court are issued. They are not limited to and only for Municipal Cases nos.676/86, 677/86 and 678/86. Mr. Desai contended that the conclusion by the learned Magistrate that requisition is issued in only three cases referred is arrived because Advocate Mr. A.C. Dalal for the Corporation has stated that only three requisitions are issued in this case. According to the learned Magistrate for each breach alleged in each of the complaints requisitions were required to be issued separately and produced before the Court alongwith the complaint. According to the learned Magistrate there is nothing on record to show that requisitions were issued for the cases other than three referred above to constitute offence and bring in time criminal action for breach of Rule 21. It appears that it was not contended also that three requisitions cover all the breaches. Mr. Desai contended that these three requisitions are not confined only to three cases referred to by the learned Magistrate. No doubt the requisitions are three in number but they refer to and cover all the cases for which the complaints are filed. It is true that said requisitions or copies thereof are not filed in other cases to show that they are also the requisitions for the breaches complained in other cases. All these requisitions are served on the accused on 5th August, 1986 and 7th August 1986 respectively. These requisitions refer to import of cement within the Municipal limits of Surat Municipal Corporation for one year commencing from 1st January, 1984 to 31st December, 1984. There is relevant correspondence also which has ultimately led to issuance of said requisitions under form no.7. According to learned Advocate Mr. Desai these requisitions do not confine only to cases referred

by the learned Magistrate i.e. Municipal Cases nos.676/86, 677/86 and 678/86, but also cover other cases. It is stated in paragraph 6 of the complaint that requisitions were issued to the accused in form no.7 under Rule 21 of the Octroi Rules which were not returned duly filled in by the accused and on further verification the complainant knew of the offence on a day.(The date is stated in each complaint. Admittedly, the complaints are filed on 17th July, 1987. Under Section 428 of the B.P.M.C. Act, complaint is required to be filed within period of six months of the knowledge of offence. The said period of six months in view of clause (b) of Section 428 of the B.P.M.C. Act commences from the date of knowledge of such offence. Issuance of requisition under Rule 21 of the Octroi Rules is admittedly of 5th August, 1986. All the complaints are filed on or before 28th February, 1987. There is no dispute as to these two dates. The only controversy is whether said three requisitions cover all the complaints or only the three referred to by the learned Magistrate. If one reads these requisitions it is clear that they pertain to the import of the goods during the period covering 1st January, 1984 to 31st December, 1984. In these very requisitions quantity of cement imported in each month is also stated.

The accused by his application Exh.8 has prayed for dismissal of complaints on the ground that the same are barred under Section 468 of the Code and Section 428 of the B.P.M.C. Act. Section 468 of the Code is required to be read with Section 473 of the Code:

Extension of period of limitation in certain cases.

473. Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interest of justice.

Under this Section a duty is cast on the Court itself to consider and decide whether it is necessary to take cognizance in the interest of justice despite delay. Legislature while introducing Chapter XXXVI , namely, limitation for taking cognizance of certain offences has given this discretion to the Court to take cognizance despite delay with a view to see that delay need not defeat criminal justice. Such power is also provided by

Section 5 of Limitation Act,1963. The Supreme Court has in the case of VANKA RADHAMANOHARI(SMT) V .VANKA VENKATA REDDY AND OTHERS (1993 SCC (CRI) 571) observed that the general rule of limitation is based on the Latin maxim: Vigilantibus, et non dormientbus, jura subvenium((the vigilant, and not the sleepy, are assisted by the laws). That maxim cannot be applied in connection with offences relating to cruelty against women. This maxim is also not applied to economic offences. The legislature has framed the Economic Offences(Inapplicability of Limitation) Act, 1974 and all the economic offences are mentioned there and there are few which are added by the Central Government and some of the States have also added in that schedule some of the acts under which the offences amount to economic offence. Avoiding of octroi , in my opinion, is also in the nature of an economic offence. Octroi duty is in the nature of Revenue for local government. Decrease in collection thereof adversely affects the development of the local government and social works thereof. The local Government is deprived of the income which ultimately affects the farewell of the people. Such offence should also be treated like an economic offence. This apart, in view of Section 473 of the Code, it was the duty of the Magistrate to decide whether it should take cognizance of the offence, even if the complaint is barred by limitation. Unless this point is determined, the learned Magistrate has no jurisdiction to dismiss the complaint as barred by limitation. This apart, there is, in each complaint a reference of breach of Rule 21 of the Octroi Rules and issuance of requisitions therefor. Thus, when there is a reference of requisitions in form no.7 in the complaint, complaint cannot be held barred by limitation. In the instant case learned Magistrate held that complaints are barred by limitation. This so happened because the learned Advocate for complainant had not brought to the notice of the Court that said three requisitions cover all the complaints and do not confine to said three complaints. Now it is shown and demonstrated before this Court by learned Advocate Mr. Desai that said three requisitions also cover all the complaints and the complaints are filed within the period of limitation. Shri Desai also contended that in the interest of justice complainant should be given an opportunity to produce and prove said requisitions in all the complaints. This Court should hold that statement of fact made by the learned Advocate before the Magistrate was on some misconception of fact and the party, a public body should not suffer for the same. The learned Advocate therefore contended that the matter be remanded back to the trial Court. In view of above discussion,

the arguments of learned Advocate Mr.P.G. Desai is required to be accepted. It is not that the Corporation has kept quiet after issuance of requisition They have sent reminders also. When the three requisitions cover all the criminal complaints atleast copies ought to have been produced in all the cases. However, if copies are not produced, they can be produced at trial. Then it is a matter of procedure and proof to get these requisitions produced and proved in other complaints. It happens in trials that there may be one original document and the same is required to be produced in number of cases. The cases wherein the original cannot be produced does not suffer if proved by other mode of proof. Here also when said three requisitions pertain to all the cases, the original can be produced in one case, proved therein and withdrawn thereafter after placing copy thereof and the original can be produced in other case.

In view of above discussion, all the matters are required to be remanded to the learned Magistrate, Surat with a direction to readmit these criminal cases on his file for the purpose of deciding the question whether all these complaints for the alleged breach of Rule 21 are within time or not after taking into consideration whether the alleged requisitions are issued for each of the cases , and if so proved, then proceed further in accordance with law on merits of the case, The learned Magistrate may permit the parties to lead necessary evidence to prove issuance of requisitions in each cases and then may proceed further in accordance with law to decide the complaints.

In the result, Rule issued in all these applications is made absolute and the criminal complaints are remanded back to the learned Magistrate for examining the question about the alleged breach of Rule 21 and issuance of requisition in each case read with Rules 28 and 398 of the B.P.M.C. Act and if necessary on merits if such inquiry on merits survives in the light of the decision on limitation.

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